



FH
[REDACTED]

STATE OF WISCONSIN
Division of Hearings and Appeals

In the Matter of

[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]

DECISION

FCP/150781

PRELIMINARY RECITALS

Pursuant to a petition filed July 19, 2013, under Wis. Admin. Code § DHS 10.55, to review a decision by the Ozaukee County Department of Social Services in regard to Medical Assistance, a hearing was held on August 20, 2013, at Port Washington, Wisconsin.

The issues for determination are:

1. Whether the county agency properly determined the Petitioner's cost share; and
2. Whether the Petitioner is responsible for room and board for her stay at an adult family home.

There appeared at that time and place the following persons:

PARTIES IN INTEREST:

Petitioner:

[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]

Respondent:

Department of Health Services
1 West Wilson Street
Madison, Wisconsin 53703

By: Cagmer Plenk

Ozaukee County Department of Social Services
121 W. Main Street
PO Box 994
Port Washington, WI 53074-0994

ADMINISTRATIVE LAW JUDGE:

Debra Bursinger
Division of Hearings and Appeals

FINDINGS OF FACT

1. Petitioner (CARES # [REDACTED]) is a resident of Ozaukee County.
2. On February 18, 2013, the Petitioner was placed in respite care in an adult family home (AFH). She remained in respite care until March 15, 2013. On March 16, 2013, Petitioner was permanently placed at the AFH. The AFH is a corporate owned facility.
3. On June 5, 2013, the agency processed the Petitioner's renewal MA for Community Waiver PACE or Partnership (Home Based) coverage and determined the Petitioner was eligible for Community Waiver PACE or Partnership coverage effective June 1, 2013 with no cost share. A Notice of Decision was issued to the Petitioner on June 7, 2013.
4. On June 24, 2013, the agency billed the Petitioner for room and board informed the Petitioner of room and board liability of \$750/month effective February, 2013.
5. On July 11, 2013, the agency was contacted by Community Care who reported Petitioner's unearned income of \$246/month in sick/disability benefits. The agency had previously incorrectly determined these benefits were "unavailable." Petitioner also has monthly unearned income of \$1165 from Social Security. Her total gross monthly income was \$1,411. Petitioner had rent expense of \$550/month.
6. On July 15, 2013, the agency issued a Notice of Decision informing the Petitioner of a cost share in the amount of \$321/month effective August 1, 2013.
7. On July 30, 2013, the Petitioner moved home and no longer resided at the AFH.
8. On August 15, 2013, the agency re-calculated the Petitioner's cost share and determined the Petitioner's cost share should have been \$75/month for June and July, 2013 instead of \$0 as previously calculated due to agency error in not including the \$246/month in sick benefits. It further determined the cost share effective August 1, 2013 is \$0.
9. On July 19, 2013, the Petitioner filed an appeal with the Division of Hearings and Appeals.

DISCUSSION

The Family Care Program, which is supervised by the Department of Health Services, is designed to provide appropriate long-term care services for elderly or disabled adults. It is authorized in the Wisconsin Statutes, §46.286, and is described comprehensively in the Wisconsin Administrative Code, Chapter DHS 10.

A. Cost Share

Cost sharing is the monthly amount a FC participant has to contribute toward the cost of his/her waiver services. MEH, § 28.5.1. Payment of the cost share is a condition of eligibility. Id. The allowable deductions from income are the personal maintenance allowance and, where the FCP member is the custodial parent, a family maintenance allowance. MEH, §§28.8.3.1 and 28.8.3.2.

In this case, the agency incorrectly calculated cost share due to an inaccurate determination by the agency that the Petitioner's sick benefits of \$246/month were "unavailable." The agency sent notice that the cost share was \$0 effective June 1, 2013. Subsequently, on August 15, 2013, the agency determined that the cost share for June and July, 2013 should have correctly been calculated at \$75/month. The agency did not provide a copy of any notice to the Petitioner informing her of this change. Based on the testimony at the hearing, the Petitioner did not know of this change in the cost share until the hearing. The Medicaid Handbook policies do not allow the agency to subsequently recover this incorrectly calculated cost share as it was due to agency error. The agency is, in essence, seeking to recover an overissuance of benefits.

Do not initiate recovery for a Medicaid overpayment if it resulted from a non-member error, including the following situations:

...

2. Agency error (keying error, math error, failure to act on a reported change, etc).

MEH § 22.2.1.2.

The Petitioner testified and the agency confirmed that the Petitioner already paid \$321 to the agency for the August, 2013 cost share. Based on the agency's determination that there is no cost share effective August 1, 2013 and the agency's inability to recover for its incorrect cost share calculations for June and July, 2013, the agency must refund \$321 to the Petitioner if it was, in fact, paid.

B. Room and Board

Medicaid waiver funds may not be used to pay for costs associated with room and board in a substitute care living arrangement. Because room and board cannot be covered with Medicaid waiver funds it is generally paid for with the participant's resources. Medicaid Waivers Manual Appendix J-1.

In an assisted living setting such as an AFH, a distinction is made between the cost of care/supervision and cost of room and board. FC and the calculated cost share for a member cover costs related to care/supervision. Room and board is the responsibility of the member. The MCO is required to calculate the amount of income a member has available for room and board based on the member's monthly earned income and deductions for health insurance premiums, medical/remedial expenses, special exempt income, family maintenance allowance, spousal income allocation and cost share. There is also an earned and unearned income disregard and discretionary income allowance. This calculation is required to be done at the time the member enters the facility. DLTC Numbered Memo Series 2010-05, March 5, 2010. The remaining income is the income that is available to the member for room and board. This is referred to as the member's room and board obligation.

The agency presented evidence at the hearing with regard to how it determined the Petitioner's room and board expense of \$750/month. Specifically, the contracted rate for room and board at this AFH is \$750/month. The agency produced a worksheet documenting its determination of the Petitioner's income that is available to pay for room and board. The Petitioner's unearned income is \$1165/month. The agency applied a \$20 unearned income disregard, a \$60 discretionary income allowance, and a deduction of \$75 for cost share obligation. It determined that the Petitioner had \$1010/month available for room and board, sufficient to pay the \$750/month room and board cost.

The Petitioner was represented at the hearing by her husband who argued that he was not told of the room and board expense until June. He testified that he would not have agreed to place Petitioner at the AFH if he had known they would be responsible for the room and board cost of \$750/month. The current outstanding room and board balance due is \$3,394.56. The Petitioner's husband seeks relief from payment of this balance.

The agency testified that there was no room and board cost for the period of February 18 – March 15, 2013 when the Petitioner was placed on respite care. The agency testified that there was a discussion of room and board cost during discussions with the Petitioner's husband though it concedes that the actual cost might not have been discussed or made known to the Petitioner's husband until June or July.

In essence, Petitioner's husband is asserting an equitable estoppel argument that the agency misled him to his detriment, and that the Division of Hearings and Appeals should enter an order for the Petitioner to

not be required to pay the room and board obligation. It is, however, the long-standing policy of the Division of Hearings and Appeals that the Division does not possess equitable powers. See, e.g., *Wisconsin Socialist Workers 1976 Campaign Committee v. McCann*, 433 F.Supp. 540, 545 (E.D. Wis.1977). The Division of Hearings and Appeals must limit its review to the law as set forth in statutes, federal regulations, administrative code provisions and program policies in accord with these laws. The law clearly states that room and board are obligations of the FC participant. The Petitioner's frustration at not being told of the cost of room and board for which she would be responsible at the time of entering the AFH is understandable. However, there is no specific notice requirement for the agency as the waiver document is clear that Medicaid waiver funds may not be used for room and board in an assisted living facility. Therefore, the agency did not violate any provisions of the program in not providing notice to the Petitioner and DHA does not have authority to provide the equitable relief sought by the Petitioner.

CONCLUSIONS OF LAW

1. The agency may not imposed and collect a cost share of \$75/month for June and July, 2013.
2. The Petitioner is required to pay room and board costs of \$750/month for her stay at an AFH.

THEREFORE, it is

ORDERED

With regard to the cost share, the agency is ordered to take all administrative steps necessary to cease collection of a cost share of \$75/month from the Petitioner for the months of June and July, 2013 and to refund to the Petitioner any cost share that was paid to the agency for the months of June, July and August, 2013.

With regard to the room and board issue, the petition is hereby dismissed.

REQUEST FOR A REHEARING

This is a final administrative decision. If you think this decision is based on a serious mistake in the facts or the law, you may request a rehearing. You may also ask for a rehearing if you have found new evidence which would change the decision. Your request must explain what mistake the Administrative Law Judge made and why it is important or you must describe your new evidence and tell why you did not have it at your first hearing. If you do not explain these things, your request will have to be denied.

To ask for a rehearing, send a written request to the Division of Hearings and Appeals, P.O. Box 7875, Madison, WI 53707-7875. Send a copy of your request to the other people named in this decision as "PARTIES IN INTEREST." Your request for a rehearing must be received no later than 20 days after the date of the decision. Late requests cannot be granted.

The process for asking for a rehearing is in Wis. Stat. § 227.49. A copy of the statutes can be found at your local library or courthouse.

APPEAL TO COURT

You may also appeal this decision to Circuit Court in the county where you live. Appeals must be served and filed with the appropriate court no more than 30 days after the date of this hearing decision (or 30 days after a denial of rehearing, if you ask for one).

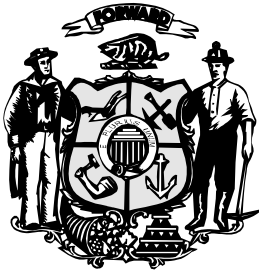
For purposes of appeal to circuit court, the Respondent in this matter is the Department of Health Services. After filing the appeal with the appropriate court, it must be served on the Secretary of that Department, either personally or by certified mail. The address of the Department is: 1 West Wilson

Street, Madison, Wisconsin 53703. A copy should also be sent to the Division of Hearings and Appeals, 5005 University Avenue, Suite 201, Madison, WI 53705-5400.

The appeal must also be served on the other "PARTIES IN INTEREST" named in this decision. The process for appeals to the Circuit Court is in Wis. Stat. §§ 227.52 and 227.53.

Given under my hand at the City of Milwaukee,
Wisconsin, this 8th day of October, 2013

\sDebra Bursinger
Administrative Law Judge
Division of Hearings and Appeals



State of Wisconsin\DIVISION OF HEARINGS AND APPEALS

Wayne J. Wiedenhoeft, Acting Administrator
Suite 201
5005 University Avenue
Madison, WI 53705-5400

Telephone: (608) 266-3096
FAX: (608) 264-9885
email: DHAmail@wisconsin.gov
Internet: <http://dha.state.wi.us>

The preceding decision was sent to the following parties on October 8, 2013.

Ozaukee County Department of Social Services
Office of Family Care Expansion